United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Stipred

76-4193

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

HELEN KELLNER,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE DECISION OF THE

UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

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TABLE OF CONTENTS

Page

Statement of the issues presented---------- 1
Statement of the case---------- 2
Summary of argument---------- 7
Argument:

I. The Tax Court correctly determined that taxpayer received no amounts in 1968 qualifying for the sick pay exclusion of Section 105(d) of the Internal Revenue Code of 1954---------- 9

II. The Tax Court correctly held that taxpayer failed to substantiate her alleged dependent care, medical, legal, and business expenditures and charitable contributions in excess of the amounts the Tax Court allowed---------- 13

A. Medical Expenditures---------- 14

B. Employee Business Expenses---------- 17

C. Legal Expenses---------- 23

D. Dependent Care Expense---------- 24

E. Charitable Contributions---------- 25

Conclusion---------- 26
Appendix A---------- 27
Appendix B---------- 35

CITATIONS

Cases:

Bernstein v. Commissioner, 20 T.C.M. 804 (1961)--- 11
Birnbaum v. Commissioner, 117 F. 2d 395 (C.A. 7, 1941)---------- 15
Bodzin v. Commissioner, 509 F. 2d 679 (C.A. 4, 1975)---------- 18
Burr v. Commissioner, 25 T.C.M. 592 (1966)-------- 11
Cohan v. Commissioner, 39 F. 2d 540 (C.A. 2, 1930)---------- 8,17,25
Cohen v. Commissioner, 41 T.C. 181 (1963)--------- 11,13
Commissioner, v. Disston, 325 U.S. 442 (1945)----- 10
Commissioner v. Duberstein, 363 U.S. 278 (1960)--- 10

Page

Cases (continued):

Denison v. Commissioner, 30 T.C.M. 1074 (1971)---- 20
Foyer v. Commissioner, 19 T.C.M. 1370 (1960)------ 16
Gino v. Commissioner, 60 T.C. 304 (1973)---------- 21
Gino v. Commissioner, 538 F. 2d 833 (C.A. 9, 1976)---------- 10,20,21
Halle v. Commissioner, 7 T.C. 245 (1946), aff'd, 175 F. 2d 500 (C.A. 2, 1949), cert. denied, 338 U.S. 949 (1950)---------- 15
Harris v. Commissioner, 46 T.C. 672 (1966)-------- 16
Henderson v. Commissioner, 27 T.C.M. 109 (1968)--- 22
Hesse v. Commissioner, 60 T.C. 685 (1973), aff'd without opinion, 511 F. 2d 1393 (C.A. 3, 1975)---------- 23
Hoggard III v. United States, 67-2 U.S.T.C., par. 9741 (E.D. Va., Oct. 27, 1967)---------- 22
Kellner v. Commissioner, 30 T.C.M. 448 (1971) aff'd per curiam, 468 F. 2d 627 (C.A. 2, 1972)---------- 10,16
New Colonial Co. v. Helvering, 292 U.S. 435 (1934)---------- 13
Newi v. Commissioner, 432 F. 2d 998 (C.A. 2, 1970)---------- 18,20
Parrish, M. C. & Co. v. Commissioner, 3 T.C. 119 (1944)---------- 18
Potts, Davis & Co. v. Commissioner, 431 F. 2d 1222 (C.A. 9, 1970)---------- 15
Quock Ting v. United States, 140 U.S. 417 (1891)---------- 15
Rodgers v. Commissioner, 241 F. 2d 552 (C.A. 8, 1957)---------- 16
United States v. Correll, 389 U.S. 299 (1967)----- 23
United States v. Gilmore, 372 U.S. 39 (1963)------ 24
Weinroth v. Commissioner, 33 T.C. 58 (1959)------- 11,13
Welch v. Helvering, 290 U.S. 111 (1933)---------- 10

Statutes:

Internal Revenue Code of 1954 (26 U.S.C.):
Sec. 71---------- 23
Sec. 105---------- 9,27
Sec. 162---------- 17,28
Sec. 170---------- 25
Sec. 212---------- 23
Sec. 213---------- 14,28
Sec. 214---------- 24,29
Sec. 262---------- 18,29
Sec. 280---------- 19
Sec. 7481---------- 10

Page

Statutes (continued):

Education Law, McKinney's Consol. Laws of N. Y. Ann., § 3107---------- 11

Miscellaneous:

Federal Rules of Civil Procedure, Rule 52------- 10
4A Mertens, Law of Federal Income Taxation (Rev.), § 25A.07---------- 23
Rev. Rul. 57-359, 1957-2 Cum. Bull. 94---------- 13
Rev. Rul. 58-110, 1958-1 Cum. Bull. 155---------- 16
Rev. Rul. 62-180, 1962-2 Cum. Bull. 52---------- 19,21,23
Rev. Rul. 64-272, 1964-2 Cum. Bull. 55---------- 19
Rev. Rul. 74-185, 1974-1 Cum. Bull. 34---------- 13
Rules of Practice and Procedure, United States Tax Court (Jan. 1, 1974):
Rule 41---------- 18
Rule 142---------- 10
Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):
§ 1.105-4---------- 11,13,29
§ 1.105-5---------- 10,33
§ 1.262-1---------- 19,33

IN THE UNITED STATES COURT OF APPEALS

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No. 76-4193

HELEN KELLNER,

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COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE DECISION OF THE

UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Tax Court correctly determined that taxpayer[1/] was not entitled to exclude any of her gross income for 1968 as sick pay under Section 105(d) of the Internal Revenue Code of 1954.

2. Whether taxpayer established, through proper substantiation, her entitlement to deductions for dependent care, medical, legal, and business expenditures, and charitable contributions in excess of the amount allowed by the Tax Court.

1/ Helen Kellner will be referred to as taxpayer herein.

STATEMENT OF THE CASE

This case involves federal income tax deficiencies asserted against taxpayer in the amounts of $838.49 for 1967 and $999.58 for 1968. (Op. 1.)[2/] The Tax Court (Honorable Theodore Tannenwald, Jr.) entered its decision on June 7, 1976, determining that deficiencies were due from taxpayer in the amount of $813.59 for 1967 and $946.01 for 1968. The memorandum findings of fact and opinion of the Tax Court, filed March 9, 1976, are reported at 35 T.C.M. 326. Notice of appeal was filed on June 25, 1976. (Docket Entries 2.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

The relevant facts may be summarized as follows:

Taxpayer, a resident of New York at the time of filing her petition in the Tax Court, timely filed her federal income tax returns for tax years 1967 and 1968 with the District Director of Internal Revenue, Manhattan District, New York. In those years, taxpayer was employed as a public school art teacher by the Board of Education of the City of New York. She was absent from her employment on account of illness on February 9, 13, 14, 15, and 16, 1968, and from February 26 through May 24, 1968. At no time during this period of illness was taxpayer hospitalized. (Op. 3-4.)

2/ References to documents are to the documents in the original record on appeal as prepared by the Clerk of the Tax Court for transmittal to this Court.

Taxpayer's annual salary was $12,600 for the 1967-1968 school year, payable in 12 monthly installments of $1,050 each. The payments which she received each month represented compensation for the month preceding the month previous to payment, e.g., she was paid in March for January. For each day of absence on account of illness not represented by fully paid sick leave, 1/300th of her annual salary, or $42, was deducted from her compensation. Inasmuch as the academic year was less than 300 days, a substantial part of taxpayer's compensation was attributable to days on which she was not required to work. Taxpayer had sick leave available for all days of absence in February, and March 1, 4, and 5. It was only for the days on which taxpayer had sick leave available that she was paid on account of illness. (Op. 3-5.)

In computing her taxable income for 1968, taxpayer claimed an exclusion of $1,146 for sick pay. (Appellant's Br. 4.) The Commissioner disallowed this exclusion. The Tax Court determined that the amounts excluded did not come within Section 105(d) of the Internal Revenue Code of 1954 because taxpayer was only paid for 12 days on the account of illness, the rate of pay exceeded $100 per week, the period in which such amounts were paid did not run consecutively for 30 days or more, and in such periods taxpayer was not hospitalized. (Op. 4-5.)

On her returns filed in 1967 and 1968, taxpayer claimed deductions for medical expenditures for herself and her mother, for which she was not compensated by insurance, in the following amounts (Op. 6):

	1967	1968
Cost of medicine	$ 520	$ 215
Other medical and dental expenses	2,823	5,606

The Commissioner conceded expenditures for medicine of $104.12 for 1967 and of $167.29 for 1968 and other medical and dental expenditures of $400 for 1967 and of $2,644.31 for 1968, such amounts being subject to the limitations of Section 213 of the Code. Though taxpayer submitted bills for certain medical expenditures, she failed to present sufficient information for the Tax Court to determine whether such bills were included in the amounts conceded by the Commissioner. As the amounts of such bills did not exceed the amount allowed by the Commissioner, the Tax Court disallowed the balance of the claimed expenses. (Op. 6-7.)

For the years in issue, taxpayer deducted various amounts as employee business expenses, part of which the Commissioner disallowed. Of the $150 deducted by taxpayer in both 1967 and 1968 for professional journals, books, and supplies, the Commissioner allowed $50 for each year. In 1967, taxpayer deducted $25 for protective clothing and $275 for substitute teachers. The Commissioner disallowed both deductions. In 1968, taxpayer deducted $245 for use of her apartment for business, which the Commissioner disallowed. (Op. 7.) At trial and in her brief, the taxpayer claimed additional deductions for 1967 and 1968. For lack of a specific part of her apartment set aside for

business use, and because her place of business was the school where she taught, the Tax Court disallowed her claim for use of her apartment for business. Since she did not pay the substitute teachers, the Tax Court disallowed that claim. The claim for protective clothing for 1967 was allowed. The balance of the claimed business expense deductions were disallowed for want of substantiation. (Op. 7-9.)

Taxpayer claimed a $320 deduction on her 1968 tax return for charitable contributions. The Commissioner allowed $150 of the amount claimed. For want of evidence, the Tax Court determined that she was entitled to no more than that allowed by the Commissioner. (Op. 12.)

In 1967, taxpayer was divorced. On her 1967 tax return, taxpayer claimed a $300 deduction as legal expenses for her unsuccessful pursuit of alimony. The Commissioner disallowed this deduction. In her brief in the Tax Court, the taxpayer claimed that the deduction should have been $1,039.22. The Tax Court determined that taxpayer had failed to show that her legal expenses were not attributable solely to the procurement of the divorce decree. There was no evidence that taxpayer had even made a claim for alimony. Accordingly, the Tax Court also disallowed this deduction. (Op. 10-11.)

Taxpayer's mother became quite ill in 1968. After a period of hospitalization, taxpayer's mother came to live with taxpayer on May 22, 1968, and resided with taxpayer until her death in the Summer of 1968. As taxpayer was away from home during the days school was in session from May 24 through June, and as her mother required constant care, petitioner hired persons to sit with her mother while taxpayer was working. On her 1968 tax return, taxpayer claimed a $210 deduction for dependent care. The Commissioner disallowed this deduction for lack of substantiation. Although taxpayer failed to establish such expenditures by documentary evidence, the Tax Court determined that taxpayer had hired persons to be with her mother thus enabling taxpayer to be gainfully employed, and had expended $120 for such care. To this extent, the Tax Court allowed the deduction. (Op. 11-12.)

From the decision of the Tax Court, taxpayer now prosecutes this appeal.

SUMMARY OF ARGUMENT

1. The Tax Court correctly held that taxpayer received no amounts in 1968 qualifying for the sick pay exclusion under Section 105(d) of the Internal Revenue Code of 1954. That section provides for the exclusion of income received by an employee through an accident or health plan where such amounts constitute wages or payments in lieu of wages for a period during which the employee is absent from work on account of sickness, and where the amounts do not exceed a weekly rate of $100. Further, there is a waiting period of 30 days for each period of absence if the amount received exceeds 75 percent of the recipient's regular wages. In the instant case, the taxpayer received payments under a health plan which constituted wages for a period during which she was absent from work on account of sickness on February 9, 13, 14, 15, and 16, 1968, and from February 26 through March 5, 1968. Taxpayer was paid in full for each day of sick leave. Since neither period exceeded 30 days, and as the rate she was paid exceeded 75 percent of her regular wages, she was not entitled to exclude the amounts she received during these periods. Between March 6 and May 24, 1968, taxpayer was also absent from school because of illness. But none of the amounts that she received during this period was paid pursuant to a health plan. Rather, they represented compensation attributable to periods that taxpayer was not required to work. Accordingly, none of these amounts was excludable under Section 105(d).

2. The Tax Court also correctly determined that taxpayer had failed to prove her entitlement to medical, dependent care, legal, and business expenditures, and charitable contributions in excess of the amount that it allowed. It is basic to federal income tax law that deductions are a matter of legislative grace, and a taxpayer must prove that he is entitled thereto. Under this Court's decision in Cohan v. Commissioner, 39 F. 2d 540 (1930), the Tax Court allowed a business expense item and a dependent care deduction that had been disallowed by the Commissioner. In view of the record, the Tax Court was extremely generous in so doing. Apart from her testimony, taxpayer failed to introduce any substantiating evidence that the amounts allowed by the Commissioner should have been increased. She has not shown on this appeal that the Tax Court's determination is clearly erroneous.

The decision of the Tax Court should be affirmed.

ARGUMENT

I

THE TAX COURT CORRECTLY DETERMINED THAT TAXPAYER RECEIVED NO AMOUNTS IN 1968 QUALIFYING FOR THE SICK PAY EXCLUSION OF SECTION 105(d) OF THE INTERNAL REVENUE CODE OF 1954

The taxpayer excluded as sick pay $1,146 from her gross income for 1968.[2a/] The Commissioner disallowed this exclusion as not qualifying under Section 105(d) of the Internal Revenue Code of 1954, Appendix A, infra, which excludes from gross income amounts received by an employee through accident or health insurance for personal injuries or sickness--

> if such amounts constitute wages or payments in lieu of wages for a period during which the employee is absent from work on account of personal injuries or sickness; but this subsection shall not apply to the extent that such amounts exceed a weekly rate of $100. The preceding sentence shall not apply to amounts attributable to the first 30 calendar days in such period, if such amounts are at a rate which exceeds 75 percent of the regular weekly rate of wages of the employee (as determined under regulations prescribed by the Secretary or his delegate). If amounts attributable to the first 30 calendar days in such period are at a rate which does not exceed 75 percent of the regular weekly rate of wages of the employee, the first sentence of this subsection (1) shall not apply to the extent that such amounts exceed a weekly rate of $75, and (2) shall not apply to amounts attributable to the first 7 calendar days in such period unless the employee is hospitalized on account of personal injuries or sickness for at least one day during such period. If such amounts are not paid on the basis of a weekly pay period, the Secretary or his delegate shall by regulations prescribe the method of determining the weekly rate at which such amounts are paid.

2a/ Taxpayer's computation of her sick pay exclusion is made part of her 1968 return. (Ex. 2-B.) The $1,146 figure is derived from other amounts which are, at least ambiguous, and her testimony at trial (June Tr. 29-30; Dec. Tr. 24-25) did nothing to clarify the method she used or the dollar amounts resulting therefrom.

Code Section 105(e), Appendix A, infra, treats amounts received under an accident or health plan as amounts received through accident or health insurance. "In general, an accident or health plan is an arrangement for the payment of amounts to employees in the event of personal injuries or sickness." § 1.105-5(a), Treasury Regulations on Income Tax (1954 Code), Appendix A, infra.

The Commissioner's deficiency determinations are presumptively correct, and the burden is on the taxpayer to prove them erroneous. Rule 142, Rules of Practice and Procedure, United States Tax Court (Jan. 1, 1974); Commissioner v. Disston, 325 U.S. 442, 449 (1945); Welch v. Helvering, 290 U.S. 111, 115 (1933); Kellner v. Commissioner, 30 T.C.M. 448 (1971), aff'd per curiam, 468 F. 2d 627 (C.A. 2, 1972). The taxpayer has failed to bring her claim within the statute. The Tax Court's factual findings rejecting taxpayer's claims are entitled to affirmance unless they are clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure; Sec. 7481(a), Internal Revenue Code of 1954 (26 U.S.C.); Commissioner v. Duberstein, 363 U.S. 278, 290-291 (1960). Taxpayer has failed to show error in this determination.

Taxpayer, a teacher in the New York City public school system, meets the requirement of being absent from work due to illness on February 9, 13, 14, 15, and 16, 1968, and from February 26 through May 24, 1968. Taxpayer, however, has failed to show that she received excludable wages or payments in lieu of wages pursuant to an accident or health plan during her illness for a period exceeding 30 days.

Taxpayer's annual salary was $12,600 for the 1967-1968 school year, payable in 12 monthly installments of $1,050. (Op. 3.) New York City teachers are granted 10 days sick leave with pay a year, and may accumulate 200 days of unused sick leave. § 3107, Education Law, McKinney's Consol. Laws of N. Y. Ann.; Cohen v. Commissioner, 41 T.C. 181, 187-188 (1963); Weinroth v. Commissioner, 33 T.C. 58, 60 (1959).[3/] Teachers are paid in full for such sick days. This is New York City's plan for compensation for sickness. Only amounts paid to taxpayer on account of illness under this plan come within Section 105(d). Taxpayer was paid under this plan for nine days in February, and March 1, 4, and 5. As the amounts received by taxpayer under this plan exceed 75 percent of her regular pay (Op. 4; Resp. Ex. E), the taxpayer had to be absent for a period exceeding 30 days before any amount could be excluded under Section 105(d). This exclusion applies to each absence from work. § 1.105-4(e)(1), Treasury Regulations on Income Tax (1954 Code), Appendix A, infra. Taxpayer's first period of

3/ The taxpayer submitted neither her teaching contract nor the bylaws of the New York Board of Education. Accordingly, the Tax Court could have rejected taxpayer's entire claim solely for lack of evidence of receiving wages pursuant to an accident or health plan. Burr v. Commissioner, 25 T.C.M. 592, 603 (1966), the Commissioner's appeals to this Circuit and the Third Circuit dismissed (nolle pros), January 19, 1967; Bernstein v. Commissioner, 20 T.C.M. 804, 806 (1961). The Tax Court evidently believed that the evidence (June Tr. 68; Resp. Ex. E) of the computation of her pay, the fact that she was a New York City school teacher, and the relevant statute were sufficient evidence of a plan for New York City teachers as set forth in Cohen and Weinroth.

"June Tr." refers to the Transcript of the Hearing on June 9, 1975; "Dec. Tr." refers to the Transcript of the Hearing on December 3, 1973.

illness for which she received wages under the New York City plan extended from February 9 through 16. Her second period of illness for which she received wages under the plan extended from February 26 through March 5. Neither period exceeded 30 days. Accordingly, she was entitled to no exclusion under Section 105(d) for payments received for illness under New York City's wage continuation plan.

After full payment for sick days under the plan ended because her sick leave had been used up, there was subtracted from taxpayer's monthly salary for each day of absence (regardless of the reason) 1/300th of her yearly salary (1/25th of her monthly salary). (Op. 3; June Tr. 65.) As none of the months in which taxpayer was absent from March 6 through May 24 had 25 school days (March had 21 school days, of which 18 were during this period, April had 15 school days, and as of May 24 there were 18 school days), she received certain wages during this time of $294 for March, which equals a reduction of 18/25 of $1,050; $420 for April, which equals a reduction of 15/25 of $1,050; $294 for May, which equals a reduction of 18/25 of $1,050. (Resp. Ex. E.) (If, for example, April had had 25 school days, taxpayer would have received nothing). Given the factors of the 300-day yearly basis of calculation (25 days per month), the fact that school was not in session in July and August, on Saturdays and Sundays, and during several other periods, and that during the months she was absent the number of school days was less than 25, a substantial portion of taxpayer's compensation was

attributable to days on which she was not required to work. / (Op. 4.) Compensation attributable to periods when a person is not required to work does not constitute sick pay within the meaning of Section 105(d). §§ 1.105-4(a)(3)(i)(A) and (ii) and 1.105-4(a)(4), Treasury Regulations on Income Tax (1954 Code), Appendix A, infra; Cohen v. Commissioner, supra, p. 189; Weinroth v. Commissioner, supra, p. 61; Rev. Rul. 74-185, 1974-1 Cum. Bull. 34; Rev. Rul. 57-359, 1957-2 Cum. Bull. 94. Accordingly, none of the pay that taxpayer received for the period March 6 through May 24, which was not paid pursuant to a health plan and which covered periods when taxpayer was not required to work, is excludable under Section 105(d).

The Tax Court's determination disallowing the sick pay exclusion claimed by taxpayer is therefore correct.

II

THE TAX COURT CORRECTLY HELD THAT TAXPAYER FAILED TO SUBSTANTIATE HER ALLEGED DEPENDENT CARE, MEDICAL, LEGAL, AND BUSINESS EXPENDITURES AND CHARITABLE CONTRIBUTIONS IN EXCESS OF THE AMOUNTS THE TAX COURT ALLOWED

It is basic to federal income tax law that deductions are a matter of legislative grace, and that taxpayer must prove that she is entitled to the claimed deductions. New Colonial Co. v. Helvering, 292 U.S. 435, 440 (1934). As pointed out in the preceding argument, the taxpayer, to prevail, has the burden of showing error in the presumptively correct determination of the Commissioner, and of showing the determination of the Tax Court to be clearly erroneous.

A. Medical Expenditures

Section 213(a)(1) of the Code, Appendix A, infra, permits taxpayer to deduct medical expenditures for herself and her dependents to the extent that they exceed three percent of her adjusted gross income. In computing the medical expenses deduction, a taxpayer may take into account amounts paid for medicine and drugs only to the extent that they exceed one percent of adjusted gross income. Sec. 213(b) of the Code, Appendix A, infra. Taxpayer claimed for her mother and herself expenditures for medicine in 1967 of $520 and in 1968 of $215 and other medical expenditures of $2,823 in 1967 and $5,606 in 1968. (Op. 6.) Of these expenditures, the Commissioner allowed $104.12 for medicine for 1967 and $167.29 for 1968 and for other medical expenditures $400 for 1967 and $2,644.31 for 1968--all amounts being subject to the appropriate "floor" limitations of Section 213.[4/] (Op. 6-7.) Taxpayer presented 16 checks relating to medical and drug expenditures. But the checks dated 1967 and 1968 represented amounts already allowed by the Commissioner. (The Commissioner admitted that one check for medicine allowed by him in 1967 should have been allowed in 1968. This has been reflected in the amounts set forth earlier in this paragraph. See Appendix B, infra). As to the balance of her

4/ For 1967 the Commissioner allowed none of amounts taxpayer claimed to have spent on her mother for medicine and other medical expenditures. Taxpayer admitted that she could not substantiate any of the claimed expenditures for her mother for 1967. (Dec. Tr. 48.) She merely claimed that she gave her mother money in 1967 and her mother paid for doctors or medicine that insurance did not pick up. (Dec. Tr. 46-47.) There was thus no evidence in the record from which the Tax Court could have allowed her any of the claimed medical and drug deductions for her mother in 1967. She evidently does not now contest this determination. (Br. 2, 5, 12-15.)

claimed expenditures, taxpayer presented no substantiating evidence except her own testimony. It has long been held that the trial court is not required to believe the uncorroborated testimony of a taxpayer, and that such testimony will not necessarily overcome the presumptive correctness of the Commissioner's determination. Birnbaum v. Commissioner, 117 F. 2d 395 (C.A. 7, 1941), relying on Quock Ting v. United States, 140 U.S. 417 (1891); Potts, Davis & Co. v. Commissioner, 431 F. 2d 1222 (C.A. 9, 1970). A contrary rule would mean that the Commissioner's adjustments would not be presumptively correct whenever taxpayers swore to the correctness of their returns. Halle v. Commissioner, 7 T.C. 245 (1946), aff'd, 175 F. 2d 500 (C.A. 2, 1949), cert. denied, 338 U.S. 949 (1950).

Among taxpayer's claimed medical expenditures were $200 for hay fever relief in 1967, and $150 for hay fever relief in 1968. With respect to this deduction, she offered a letter from a doctor dated 1956, which the Tax Court refused to admit in evidence because it did not relate to the tax years in question. (June Tr. 51; see also, Dec. Tr. 52.) Although she claimed that she went to hay-fever-free climates for relief, she did not establish that that such trips were taken at the advice of a doctor. Further, she did not even remember at the trial where she went for this relief. (Dec. Tr. 50-53; June Tr. 49-52.) 5/

5/ The places that she claims to have gone and the amounts that she claims to have expended (Br. 14) are not in evidence. Rather, they were first mentioned in her brief in the Tax Court (pages 14-15). The admission of such information into evidence would not have advanced taxpayer's case because she failed to establish that such trips were taken at the advice of a doctor and to show that she had spent the amounts claimed for 1967.

Consequently, the taxpayer is not entitled to any deduction for hay fever relief under Code Section 213(a). See Rodgers v. Commissioner, 241 F. 2d 552 (C.A. 8, 1957); Foyer v. Commissioner, 19 T.C.M. 1370 (1960); Rev. Rul. 58-110, 1958-1 Cum. Bull. 155.

Taxpayer also claimed a medical expense deduction for special foods and vitamins. Again she submitted no evidence to support such deductions. She merely testified in general terms concerning the consumption of parsley. (June Tr. 50-51.) There is no evidence that parsley, even if she actually purchased it (she introduced no receipts for such purchases), was not simply substituted by taxpayer for other food, which would constitute a nondeductible personal expense. Harris v. Commissioner, 46 T.C. 672 (1966). Finally, the undated letter of Dr. Katz (Pet. Ex. 5) is not connected with any treatment during 1967 and 1968.

The taxpayer was aware that she had the burden of proof. (Br. 14.) She had previously been involved in litigation before the Tax Court (and this Court). See Kellner v. Commissioner, 30 T.C.M. 448 (1971), aff'd per curiam, 468 F. 2d 627 (C.A. 2, 1972), in which taxpayer litigated, inter alia, claimed deductions for medical expenses, charitable contributions, and business expenses. These were substantially disallowed by the Tax Court due to taxpayer's failure to substantiate the items in question. She was well aware that she had to maintain adequate records to support her deductions. Yet she brought only random samples of checks rather than all of her records. Indeed, there were two hearings in this case in which taxpayer had a chance to bring in

any records that she might have had. The Commissioner allowed not only every substantiated item, but also allowed additional amounts under the rule of this Court's decision in Cohan v. Commissioner, 39 F. 2d 540, 544 (1930). (Resp. Ex. C and D.) In view of the evidence presented, the Tax Court's determination is correct.

B. Employee Business Expenses

Pursuant to Section 162(a) of the Code, Appendix A, infra, a taxpayer may deduct ordinary and necessary business expenses which she incurs. Taxpayer claimed, inter alia, a $150 deduction for both 1967 and 1968 for books, supplies, and professional journals and a $25 deduction for protective clothing for 1967.[6/] The Commissioner allowed a $50 deduction for both 1967 and 1968 for books, supplies, and professional journals. The Tax Court allowed the $25 deduction for protective clothing for 1967, but allowed no additional allowance for books, supplies and professional journals. (Op. 7-8.) At the trial (Dec. Tr. 39-40; June Tr. 38-39) and in her Tax Court brief (pages 2, 4-5), taxpayer claimed entitlement to deduct (a) $275 dollars as additional union dues in 1967 and in 1968 (the $125 claimed for this deduction in her returns for those years having been fully allowed); (b) $750 for each year for parties, paints and papers in connection with her teaching; and (c) $25 for protective clothing in 1968. Aside from her very general testimony with respect to union dues and

6/ Some of taxpayer's business deductions were allowed in the amount claimed on her returns. Disallowed, however, was a $275 deduction for substitute teachers in 1967. (Op. 7.) Taxpayer does not contest on this appeal the Tax Court's disallowance of this deduction.

party, paper, and paint expenditures (Dec. Tr. 39-44; June Tr. 37-39), she submitted no evidence to substantiate such expenditures. Her testimony no more overcomes the presumption of correction of the Commissioner's determination on this issue than it did on the medical expense issue. There is simply no evidence in this record warranting deductions for these items in excess of those allowed by the Commissioner and the Tax Court.[7/]

Taxpayer also deducted $245 for the use of her apartment for business in 1968. This deduction was also disallowed by the Commissioner. (Op. 7.) At the trial (June Tr. 31) and in her Tax Court brief (pages 2, 6-7), she claimed entitlement to deduct the same amount for the use of her apartment for business in 1967 and claimed an increased amount for the 1968 deduction.

As pointed out above, Section 162(a) of the Code allows a deduction of all ordinary and necessary business expenses paid during the taxable year in carrying on a trade or business. This deduction is, however, limited by Section 262, Appendix A, infra, which provides that "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living or family expenses." Newi v. Commissioner, 432 F. 2d 998, 1000 (C.A. 2, 1970); Bodzin v. Commissioner, 509 F. 2d 679, 681

7/ Taxpayer failed to amend her petition to raise the various additional claims. It is therefore questionable whether they were properly before the Tax Court. See Rule 41, Rules of Practice and Procedure, United States Tax Court (Jan. 1, 1974); M. C. Parrish & Co. v. Commissioner, 3 T.C. 119, 129 (1944).

(C.A. 4, 1975). Section 1.262-1(b)(3), Treasury Regulations on Income Tax (1954 Code), Appendix A, infra, provides:

> Expenses of maintaining a household, including amounts paid for rent, water, utilities, domestic service, and the like, are not deductible. A taxpayer who rents a property for residential purposes, but incidentally conducts business there (his place of business being elsewhere) shall not deduct any part of the rent. If, however, he uses part of the house as his place of business, such portion of the rent and other similar expenses as is properly attributable to such place of business is deductible as a business expense.

Where a part of a residence is set aside and regularly used for business purposes because such space and facilities are required as a condition of employment to perform taxpayer's duties, a deduction is allowed for the expenses of maintaining this extra part. If, however, this portion of the residence can also be used for personal affairs, an allocation is required based on the number of hours per day during which the room is available for all uses. No deduction, however, is allowed for the voluntary, occasional, or incidental use by an employee of a part of his residence in connection with his business. Gino v. Commissioner, 538 F. 2d 833 (C.A. 9, 1976); Rev. Rul. 62-180, 1962-2 Cum. Bull. 52; Rev. Rul. 64-272, 1964-2 Cum. Bull. 55.[8/]

A review of the record in this case eminently justified the Tax Court's disallowance of this deduction. Taxpayer testified that she used her apartment for several hours per weekday to

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8/ Section 280(A) of the Code as added by Section 601(a) of the Tax Reform Act of 1976 greatly restricts the availability of a deduction for business use of a taxpayer's home. It is effective for tax years beginning after December 31, 1975.

prepare for her classes. She did not set aside any particular room or space for business use. Rather she claimed that she used her entire apartment, which consisted of two rooms, a kitchenette, and a bath. (Op. 8; Dec. Tr. 26-28; June Tr. 32-33.) Where a deduction has been allowed for business use of the home, the taxpayer has always set aside a specific area which he used for business. Newi v. Commissioner, supra; Gino v. Commissioner, supra; Denison v. Commissioner, 30 T.C.M. 1074 (1971). Taxpayer set no specific space aside for business use. For this reason alone, she fails to qualify for the deduction. In addition, taxpayer has not established that it was necessary for the proper performance of her employment duties that she maintain an office in the home. The evidence fails to show that time and space were not available in the school, which was her place of work, to prepare her art work before and after school hours or during unassigned periods during the school day. At trial, she testified that it was impossible for anyone to stay in school "nowadays after 3:00 because it's very dangerous." (Dec. Tr. 26.) Further, she testified that she telephoned parents about their children, and called museums and other places to arrange visits. (June Tr. 35.) But there is no evidence that she could not have done this from the school. Nor is there any evidence of how extensively she used the telephone at home. It is not at all clear how much time she used her apartment for business. At trial, she testified that she spent three hours a day working on school work at home. But she conceded that she did no school work on Sunday or for a

period of at least five months in 1968. (Dec. Tr. 26-31.) It is thus quite difficult to know exactly how much time she actually used her apartment for business. Further, she failed to document the additional apartment expenses claimed.[9/] There was no testimony for 1967. Accordingly, taxpayer has not established her right to this deduction for either year.

If the taxpayer were entitled to any deduction for the use of her apartment, a temporal allocation would have to be made on the basis on the number of hours per day during which the room is available for all uses. Gino v. Commissioner, supra; Rev. Rul. 62-180, supra. This is the manner in which she made her allocation in her tax returns. (Dec. Tr. 26.) In the Tax Court, she claimed that the allocation should have been made on the basis of actual use. (June Tr. 31, 33-36.) See Gino v. Commissioner, 60 T.C. 304 (1973). She maintains this position on appeal. (Br. 4.) We submit that the Tax Court's decision in Gino, which, is contrary to Rev. Rul. 62-180, is erroneous, and it should be noted that it has recently been reversed by the Ninth Circuit, supra. The Ninth Circuit's decision and the Ruling take into

9/ In her Tax Court brief (pages 6-7, xeroxed attachment of checks), she explained some of the records for using her apartment and submitted checks with respect to certain items. However, even if the statements had been made at trial and she had introduced the checks into evidence, this would not have established her right to the deduction. With respect to the telephone, for instance, she failed to show exactly how much, if any, she used it for business and to show whether the checks drawn to the telephone company were for items other than the basic charge. It is from her Tax Court brief rather than the testimony and exhibits that taxpayer takes most of her facts in her brief in this Court (pages 7-8).

account the fact that expenditures for fixed household expense are inherently personal, and pay for occupancy rights for hours when the residence is unused, as well as for hours of use. Accordingly, they require use of a numerator consisting of the number of hours per day of actual business use, and a denominator consisting of the number of hours per day available for all uses (24). The theory is that the fixed household expenses pay for 24 hours of occupancy rights, so that the time such residential space is devoted to business activity must be applied against the full 24 hours to arrive at the proportion of expenses attributable to business use. This rule has also been approved in Hoggard III v. United States, 67-2 U.S.T.C., par. 9741 (E.D. Va., Oct. 27, 1967), and in Henderson v. Commissioner, 27 T.C.M. 109 (1968), and is based on sound administrative considerations, because the denominator of the formula will usually remain a constant 24 hours and the numerator can often be verified by employers or fellow employees. Taxpayer's formula, which uses a base consisting of a number of hours of actual use of the residential space, ignores the fact that fixed household expenses must pay for residential space when it is not in use as well as when it is used, and payments for such non-use are personal in character. Further, her formula is difficult to administer and apply fairly to all taxpayers because the denominator, consisting of the number of hours a room was used for all purposes, would be known only to the taxpayer and his family. Where alternatives are available, the Supreme Court has held that the one chosen by the Commissioner is to be accepted

so long as it implements the Congressional mandate in some reasonable manner. United States v. Correll, 389 U.S. 299, 306-307 (1967). The rule chosen by the Commissioner is reasonable. The Tax Court found it unnecessary to reach this issue. If this Court deals with the allocation issue, we urge it to follow the Ninth Circuit and adopt the formula set forth in Rev. Rul. 62-180.

C. Legal Expenses

Taxpayer deducted on her 1967 tax return $300 for legal expenses for her unsuccessful pursuit of alimony. This deduction was disallowed by the Commissioner. At the trial (Dec. Tr. 36; June Tr. 40), she testified that she actually spent $750 to obtain a divorce in 1967. On brief, she claimed the proper amount for this item is $1,039.22. (Op- 10; Taxpayer's Tax Court Br. 2.)

Attorney fees paid in connection with a divorce for the production or collection of amounts includible in gross income under Section 71 of the Code are deductible under Section 212 of the Code (26 U.S.C.). This includes alimony. Hesse v. Commissioner, 60 T.C. 685, 693-694 (1973), aff'd without opinion, 511 F. 2d 1393 (C.A. 3, 1975), and the cases therein cited; § 1.262-1(b)(7), Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.); 4A Mertens, Law of Federal Income Taxation (Rev.), § 25A.07. It is, however, unnecessary to reach the issue whether the taxpayer's lack of success in obtaining alimony bars a Section 212 deduction, because the taxpayer has failed to show that any of her legal expenses were not attributable solely to the procurement of the divorce decree. There is nothing in the record

to indicate that taxpayer made any claim for alimony in the divorce proceedings. (Dec. Tr. 36-37, 44-45; June Tr. 40-41.) Accordingly, the Tax Court correctly disallowed this deduction as personal and nondeductible. United States v. Gilmore, 372 U.S. 39 (1963); § 1.262-1(b)(7), Treasury Regulations on Income Tax (1954 Code), supra.

D. Dependent Care Expense

Taxpayer claimed a $210 deduction for attendant care for her mother for 1968, which the Commissioner disallowed. Section 214(a), Appendix, infra, provides a deduction for the care of a dependent where such care enables the taxpayer to be gainfully employed.[10/] At the trial, she was unable to identify any of the individuals who allegedly cared for her mother during 1968, when her mother was discharged from the hospital, and when her mother went to the De Witt Nursing Home. She also seemed to confuse the amounts allowed for nursing care with what she claimed was paid for baby-sitters. (Dec. Tr. 34-36; June Tr. 42-44.) On brief in the Tax Court (p. 11), she claimed that her mother was discharged from the nursing home to come live with her on May 22, and that she lived with her until her death shortly after the end of the school year. She also claimed on brief that the amount of the deduction should be $600.

10/ Prior to 1972, the dependent care deduction was limited to women, widowers, or husbands of incapacitated or institutionalized wives.

The Tax Court determined that taxpayer did indeed hire persons to sit with her mother so that taxpayer could be gainfully employed. Under this Court's decision in Cohan v. Commissioner, supra, the Tax Court allowed her a deduction for $120, estimating the expenses as best as it could, and bearing heavily upon the taxpayer because her inexactitude made the estimates necessary. Taxpayer introduced no evidence as to what she spent. In fact, Judge Sterrett asked the petitioner if she had any proof of the $210 claimed. She responded as follows (Dec. Tr. 36):

> Not with me. I suppose I could get these women to write a note that they did, but I didn't bring it today.

She never brought it to the Tax Court at the June hearing some nineteen months later. In these circumstances, the Tax Court's estimate is certainly not clearly erroneous.

E. Charitable Contributions

Taxpayer claimed a $320 deduction on her 1968 tax return for charitable contributions. The Commissioner allowed her $150 of this claim. Although Code Section 170 (26 U.S.C.) allows a deduction for certain contributions to charity, the taxpayer must prove that she is entitled to more than the Commissioner allowed. The taxpayer admitted that she had no evidence to support her claim. (Dec. Tr. 38.) It is quite obvious that the Commissioner was indeed generous in applying the Cohan rule with respect to this claim, and that the Tax Court did not err in refusing to allow more.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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OCTOBER, 1976.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on appellant, appearing pro se, by mailing four copies thereof on this 13th day of October, 1976, in an envelope, with first class postage prepaid, properly addressed to her as follows:

Mrs. Helen Kellner
30 West 90th Street
New York, New York 10024

Gilbert E. Andrews/pmk
GILBERT E. ANDREWS,
Attorney.

APPENDIX A

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 105. AMOUNTS RECEIVED UNDER ACCIDENT AND HEALTH PLANS.

* * *

(d) [as amended by Sec. 205(a), Revenue Act of 1964, P.L. 88-272, 78 Stat. 19] Wage Continuation Plans.--Gross income does not include amounts referred to in subsection (a) if such amounts constitute wages or payments in lieu of wages for a period during which the employee is absent from work on account of personal injuries or sickness; but this subsection shall not apply to the extent that such amounts exceed a weekly rate of $100. The preceding sentence shall not apply to amounts attributable to the first 30 calendar days in such period, if such amounts are at a rate which exceeds 75 percent of the regular weekly rate of wages of the employee (as determined under regulations prescribed by the Secretary or his delegate). If amounts attributable to the first 30 calendar days in such period are at a rate which does not exceed 75 percent of the regular weekly rate of wages of the employee, the first sentence of this subsection (1) shall not apply to the extent that such amounts exceed a weekly rate of $75, and (2) shall not apply to amounts attributable to the first 7 calendar days in such period unless the employee is hospitalized on account of personal injuries or sickness for at least one day during such period. If such amounts are not paid on the basis of a weekly pay period, the Secretary or his delegate shall by regrulations prescribe the method of determining the weekly rate at which such amounts are paid.

(e) Accident and Health Plans.--For purposes of this section and section 104--

(1) amounts received under an accident or health plan for employees, and

(2) amounts received from a sickness and disability fund for employees maintained under the law of a State, a Territory, or the District of Columbia,

shall be treated as amounts received through accident or health insurance.

* * *

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) In General.--There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including--

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) [as amended by Sec. 4(b), Revenue Act of 1962, P.L. 87-834, 76 Stat. 960] traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.

* * *

SEC. 213. MEDICAL, DENTAL, ETC., EXPENSES.

(a) [as amended by Sec. 106(a), Social Security Amendments of 1965, P.L. 89-97, 79 Stat. 286] Allowance of Deduction.--There shall be allowed as a deduction the following amounts, not compensated for by insurance or otherwise--

(1) the amount by which the amount of the expenses paid during the taxable year (reduced by any amount deductible under paragraph (2)) for medical care of the taxpayer, his spouse, and dependents (as defined in section 152) exceeds 3 percent of the adjusted gross income, and

* * *

(b) [as amended by Sec. 211(a), Revenue Act of 1964, supra and by Sec. 106(b), Social Security Amendments of 1965, supra] Limitation With Respect to Medicine and Drugs.--Amounts paid during the taxable year for medicine and drugs which (but for this subsection) would be taken into account in computing the deduction under subsection (a) shall be taken into account only to the extent that the aggregate of such amounts exceeds 1 percent of the adjusted gross income.

* * *

SEC. 214. EXPENSES FOR CARE OF CERTAIN DEPENDENTS.

(a) [as amended by Sec. 212(a), Revenue Act of 1964, supra] General Rule.--There shall be allowed as a deduction expenses paid during the taxable year by a taxpayer who is a woman or widower, or is a husband whose wife is incapacitated or is institutionalized, for the care of one or more dependents (as defined in subsection (d)(1), but only if such care is for the purpose of enabling the taxpayer to be gainfully employed.

* * *

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.105-4 Wage continuation plans.

(a) In general. (1) Subject to the limitations provided in this section, section 105 (d) provides an exclusion from gross income with respect to amounts referred to in section 105 (a) which are paid to an employee through a wage continuation plan and which constitute wages or payments in lieu of wages for a period during which the employee is absent from work on account of personal injuries or sickness.

* * *

(3)(i)(A) Section 105(d) applies only to amounts attributable to periods during which the employee would be at work were it not for a personal injury or sickness. Thus, an employee is not absent from work if he is not expected to work because, for example, he has reached retirement age. If a plan provides that an employee, who is absent from work on account of a personal injury or sickness, will receive a disability pension or annuity as long as he is disabled, section 105(d) is applicable to any payments that he receives under this plan before reaching mandatory retirement age, as defined in paragraph (a)(3)(i)(B) of this section. Thus, section 105(d) would not apply to the payments that an employee receives after reaching mandatory retirement age. The disability retired pay received by a member on the retired list pursuant to section 402 of the Career Compensation Act of 1949 (63 Stat. 802) or chapter 61 of title 10, United States Code (10 U.S.C. 1201 et seq.) which is in excess of the amounts excludable under section 104(a)(4) and paragraph (3) of § 1.104-1 shall be excluded from gross income subject to the limitations of section 105(d) and this section, if such pay is received before the member reaches mandatory retirement age. See § 1.72-15 for additional rules relating to the tax treatment of disability pensions. For the rules relating to certain reduced uniformed services retirement pay, see paragraph (c)(2) of § 1.122-1. For rules relating to a waiver by a member or former member of the uniformed services of a portion of disability retired pay in favor of a pension or compensation receivable under the laws administered by the Veterans Administration (38 U.S.C. 3105), see § 1.122-1(c)(3).

* * *

(ii) Similarly, an employee who incurs a personal injury or sickness during his paid vacation is not allowed to exclude under section 105(d) any of the vacation pay which he receives, since he is not absent from work on account of the personal injury or sickness. Likewise, a teacher who becomes sick during the summer or other vacation period when he is not expected to teach, is not entitled to any exclusion under section 105(d) for the summer or vacation period. However, if an employee who would otherwise be at work during a particular period is absent from work and his absence is in fact due to a personal injury or sickness, a payment which he receives for such period under a wage continuation plan is subject to section 105(d).

(4) A period of absence from work shall commence the moment the employee first becomes absent from work and shall end the moment the employee first returns to work. However, the exclusion provided under section 105(d) is applicable only to payments attributable to a period of absence from work which is due to a personal injury or sickness, and to payments attributable to a period when the employee would have been at work but for such personal injury or sickness.

* * *

(e) Limitation in the case if absence from work on account of personal injury or sickness for periods commencing after December 31, 1963. (1) In the case of periods of absence from work on account of sickness or personal injury commencing after December 31, 1963, the exclusion provided by section 105(d) does not apply to amounts attributable to the first 30 calendar days of each such period, if such amounts are at a rate which exceeds 75 percent of the employee's "regular weekly rate of wages", as determined under subparagraph (5) of this paragraph. If the amounts are at a rate of 75 percent or less of the employee's "regular weekly rate of wages", the exclusion provided by section 105(d) does not apply to amounts attributable to the first 7 calendar days of each such period, unless the employee is hospitalized on account of personal injury or sickness for at least one day during the period of absence from work. The 7-or 30-day waiting period (whichever is applicable) applies to each period of absence from work because of personal injury or sickness, regardless of the frequency of such absences or the closeness in time to any prior period of absence from work because of personal injury or sickness. The waiting period is to be counted by beginning with the first work day for which the employee was absent. These rules may be illustrated by the following examples:

Example (1). Employee A is absent from work because of sickness on Tuesday, January 7, 1964, and returns to work on the morning of Thursday, February 13, 1964. He suffers a relapse and again becomes absent from work on the afternoon of Thursday, February 13, 1964. A's return to work on the morning of Thursday, February 13, 1964, terminates the first period of absence from work because of sickness, and a new period of absence from work because of sickness begins on the afternoon of Thursday, February 13, 1964.

Example (2). Employee B normally works five days (Monday through Friday) during each week. On Saturday, January 11, 1964 (a nonworking day), B becomes sick or injured and as a result he does not return to work until Monday, February 17, 1964. The period of absence from work commences on Monday, January 13, 1964, and terminates when B returns to work on Monday, February 17, 1964. Assuming B receives amounts under his employer's wage continuation plan at a rate exceeding 75 percent of his "regular weekly rate of wages" (as determined under subparagraph (5) of this paragraph), the exclusion provided by section 105(d) does not apply to amounts B receives under his employer's wage continuation plan which are attributable to the 30-day period commencing Monday, January 13, 1964, and ending Tuesday, February 11, 1964, inclusive. If B receives amounts under his employer's wage continuation plan at a rate which is 75 percent or less of his "regular weekly rate of wages" and he is not hospitalized during the period of absence from work, the exclusion provided by section 105(d) does not apply to amounts B receives which are attributable to the 7-day period commencing Monday, January 13, 1964, and ending Sunday, January 19, 1964, inclusive.

Example (3). Employee C is sick or incurs a personal injury which causes him to be absent from work for two weeks. He receives amounts under his employer's wage continuation plan at a rate which is 75 percent or less of his "regular weekly rate of wages" (as determined under subparagraph (5) of this paragraph) and is hospitalized from the eighth through the eleventh day of his absence. Since C was hospitalized on account of personal injury or sickness for at least one day during the period of absence, the 7-day waiting period does not apply, and, subject to the other requirements of section 105(d), C is entitled to an exclusion with respect to the amounts received under his employer's plan attributable to the two-week period of absence. If C were receiving amounts under his employer's wage continuation plan at a rate exceeding 75 percent of his "regular weekly rate of wages", he would not be entitled to an exclusion under section 105(d).

* * *

§ 1.105-5 Accident and health plans.

(a) In general. Sections 104(a)(3) and 105(b), (c), and (d) exclude from gross income certain amounts received through accident or health insurance. Section 105(e) provides that for purposes of sections 104 and 105 amounts received through an accident or health plan for employees, and amounts received from a sickness and disability fund for employees maintained under the law of a State, a Territory, or the District of Columbia, shall be treated as amounts received through accident or health insurance. In general, an accident or health plan is an arrangement for the payment of amounts to employees in the event of personal injuries or sickness. A plan may cover one or more employees, and there may be different plans for different employees or classes of employees. An accident or health plan may be either insured or noninsured, and it is not necessary that the plan be in writing or that the employee's rights to benefits under the plan be enforceable. However, if the employee's rights are not enforceable, an amount will be deemed to be received under a plan only if, on the date the employee became sick or injured, the employee was covered by a plan (or a program, policy, or custom having the effect of a plan) providing for the payment of amounts to the employee in the event of personal injuries or sickness, and notice or knowledge of such plan was reasonably available to the employee. It is immaterial who makes payment of the benefits provided by the plan. For example, payment may be made by the employer, a welfare fund, a State sickness or disability benefits fund, an association of employers or employees, or by an insurance company.

* * *

§ 1.262-1 Personal, living, and family expenses.

* * *

(b) Examples of personal, living, and family expenses. Personal, living, and family expenses are illustrated in the following examples:

* * *

(3) Expenses of maintaining a household, including amounts paid for rent, water, utilities, domestic service, and the like, are not deductible. A taxpayer who rents a property for residential purposes, but incidentally conducts business there (his place of business being elsewhere) shall not deduct any part of the rent. If, however, he uses part of the house as his place of business, such portion of the rent and other similar expenses as is

properly attributable to such place of business is deductible as a business expense.

* * *

Check	Date	Payee	Amount	Comments
132	9-12-67	Dr. Murray B. Goldstein	$55.00	Not additional substantiation--see Page 2 of Exhibit D.
165	1-15-68	The New York Hospital	10.00	Does not appear in Exhibit D. However, substantiation presented December 3, 1973, for medical expenses was $140.46 less than amount allowed in statutory notice.
	1-17-68	Mancy	6.72	Not additional substantiation--see Page 8 of Exhibit D.
168	1-25-68	Bloom's Shoe Shop	70.20	Not additional substantiation--see Page 3 of Exhibit C, which shows petitioner was allowed $150.00 for orthopedic braces for 1968. Substantiation presented December 3, 1973, for medical expenses was $140.46 less than amount allowed in statutory notice.
	3-5-68	Goldberger's Pharmacy	5.75	Not additional substantiation--see Page 3 of Exhibit D. Check, though, was entered in column for drugs for 1967 rather than drugs for 1968.
	3-6-68	Dr. John J. Rich	7.00	Not additional substantiation--see Page 4 of Exhibit D.
	3-8-68	Dr. John J. Rich	7.00	Not additional substantiation--see Page 4 of Exhibit D.
	3-11-68	Dr. John J. Rich	7.00	Not additional substantiation--see Page 4 of Exhibit D.
	3-30-68	Inez Bikle	120.00	Not additional substantiation--see Page 6 of Exhibit D.

Check	Date	Payee	Amount	Comments
	68	Scully-Walton	$41.50	Check listed on Page 7 of Exhibit D is for $41.10. Check here is not dated, but endorsement is dated April 16, 1968, which is day following date shown on Page 7 of Exhibit C. Substantiation presented December 3, 1973, for medical expenses was $140.46 less than amount allowed in statutory notice.
	5-28-68	B.R. Laboratories	10.00	Not additional substantiation--see Page 7 of Exhibit D.
	6-7-68	Armetta Brown	25.00	Not additional substantiation--see Page 6 of Exhibit D.
244	6-11-68	B.&R. Laboratories	10.00	Not additional substantiation--see Page 6 of Exhibit D.
253	6-25-68	B.&R. Laboratories	10.00	Not additional substantiation--see Page 6 of Exhibit D.
11	9-1-68	Keefe & Keefe	21.00	Not additional substantiation--see Page 7 of Exhibit D.
85	3-27-69	Dr. Murray B. Goldstein	10.00	Not additional substantiation--has a 1969 date.